Supreme Court, U.S.
FILED
JUN 03 1993
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1992

BARBARA LANDGRAF,
Petitioner,
v.

USI FILM PRODUCTS, BOSAR PACKAGING, INC.
and QUANTUM CHEMICAL CORPORATION,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

MAURICE RIVERS and ROBERT C. DAVISON,
Petitioners,
v.

BROADWAY EXPRESS, INC.,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF FOR MIDWEST MOTOR EXPRESS, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
INTEREST OF THE AMICUS CURIAE	2
STATEMENT	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. THE PRINCIPLE UPHELD IN BOWEN REPRESENTS THE CARDINAL RULE OF STATUTORY CONSTRUCTION GOVERNING THE RETROACTIVE APPLICATION OF FEDERAL CIVIL LEGISLATION	7
II. BOWEN PRECLUDES THE RETROACTIVE APPLICATION OF NEW FEDERAL CIVIL LEGISLATION, SUCH AS THE CIVIL RIGHTS ACT OF 1991, WHERE NO CONGRESSIONAL INTENT IS CLEAR	10
III. THE RETROACTIVE APPLICATION OF LEGISLATION, SUCH AS THE CIVIL RIGHTS ACT OF 1991, WHICH CREATES NEW LIABILITIES AND DUTIES BEYOND RESTORATIVE LAW, RESULTS IN STAGGERING REAL WORLD CONSEQUENCES	13
CONCLUSION	17
APPENDIX	
Excerpt of Section 1 from H.R. 5 and S. 55	1a

TABLE OF AUTHORITIES

CASES

	Page
Alpo Pet Foods, Inc. v. Ralston Purina Co., 913 F.2d 918 (Fed. Cir. 1990)	13
Baynes v. AT&T Technologies, Inc., 976 F.2d 1370 (1992)	13
Belknap, Inc. v. Hale, 463 U.S. 491 (1983)	16
Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988)	*passim*
Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974)	*passim*
Crown Cork & Seal Co., 255 NLRB 14, 107 LRRM 1195 (1981)	15
Davis v. Omitowoju, 833 F.2d 1155 (3rd Cir. 1989)	12
DeVargas v. Mason and Hanger-Silas Mason Co. Inc., 911 F.2d 1377 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 799 (1991)	12, 14
Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992)	7, 8
Gersman v. Group Health Ass'n, 975 F.2d 886 (D.C. Cir. 1992)	12
Gilberton Coal Co., 291 NLRB 344, 131 LRRM 1329 (1988), *enforced*, 888 F.2d 1381 (3rd Cir. 1989)	16
Johnson v. Uncle Ben's, Inc., 965 F.2d 1363 (5th Cir. 1992)	11, 13
Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 110 S. Ct. 1570 (1990)	*passim*
Lambott v. United Tribes Educational Technical Center, 361 N.W.2d 590 (1985)	16
Lehigh Metal Fabricators, 267 NLRB 568, 114 LRRM 1064 (1983)	15
Lehman v. Burnley, 866 F.2d 33 (2nd Cir. 1989)	12
Leland v. Federal Ins. Adm'n., 934 F.2d 524 (4th Cir.), *cert. denied*, 112 S. Ct. 417 (1991)	12
Luddington v. Indian Bell Telephone, 966 F.2d 225 (7th Cir. 1992), *petition for cert. pending*, No. 92-977	10, 13
Mojica v. Gannett Co., 779 F. Supp. 94 (N.D. Ill. 1991)	14

TABLE OF AUTHORITIES—Continued

	Page
Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992)	12
National Woodwork Manufacturers Ass'n v. NLRB, 386 U.S. 612 (1967)	11
NLRB v. Burkhart Foam, 848 F.2d 825 (7th Cir. 1988)	16
NLRB v. Charles D. Bonanno Linen Serv., 782 F.2d 7 (1st Cir. 1986)	16
NLRB v. Elco Manufacturing Co., 227 F.2d 675 (1st Cir. 1955), *cert. denied*, 350 U.S. 1007 (1956)	16
NLRB v. Jarm Enters, 785 F.2d 195 (7th Cir. 1986)	16
NLRB v. Mackay Radio and Telegraph Co., 304 U.S. 333 (1938)	14-15, 16
NLRB v. Remington Rand, Inc., 130 F.2d 919 (2nd Cir. 1942)	16
Pecheur Lozenge Co., 98 NLRB 496, 29 LRRM 1367 (1952), *enforced as modified*, 209 F.2d 393, 33 LRRM 2324 (2nd Cir. 1953)	16
Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984)	8
Plymouth Locomotive Works, 261 NLRB 595, 110 LRRM 1155 (1982)	15
Simmons v. A.L. Lockhart, 931 F.2d 1226 (8th Cir. 1991)	12
Society for the Propagation of the Gospel in Foreign Parts v. Wheeler, (1814) 2 Gall. C.C. 105	8
Storey v. Shearson-American Exp., 928 F.2d 159 (5th Cir. 1991)	12
Trans World Airlines v. Independent Federation of Flight Attendants, 109 S. Ct. 1225 (1989)	15
United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987)	12
U.S. v. Magnolia Petroleum Co., 276 U.S. 160 (1928)	9-10

TABLE OF AUTHORITIES—Continued

	Page
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)	7, 8
Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir.), *cert. denied*, 113 S. Ct. 86 (1992)	12
Vulcan-Hart Corp. v. NLRB, 718 F.2d 269 (8th Cir. 1983)	16
Wagner Seed Co. v. Bush, 946 F.2d 918 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1584 (1992)	12, 13
Welch v. Henry, 305 U.S. 134 (1938)	8
CONSTITUTION	
Fifth Amendment	8
STATUTES	
29 U.S.C. § 111(c)	2
29 U.S.C. § 152(9)	2
29 U.S.C. § 160(b)	15
29 U.S.C. § 1398	2
42 U.S.C. § 1981	13
Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071	*passim*
§ 402(a), 105 Stat. 1099	11
MISCELLANEOUS	
136 Cong. Rec. S16,457 (daily ed. Oct. 22, 1990)	10
136 Cong. Rec. S16,589 (daily ed. Oct. 22, 1990)	10
137 Cong. Rec. S15,483, S15,485 (daily ed. Oct. 30, 1991)	11
137 Cong. Rec. S15,472, S15,478 (daily ed. Oct. 30, 1991)	11
137 Cong. Rec. S15,485 (daily ed. Oct. 30, 1991)	11
Civil Rights Act of 1990: *Hearing Before the Senate Comm. on Labor and Human Resources on S. 2104*, 101st Cong., 1st Sess. (1989)	10
Coil and Weinstein, *Past Sins or Future Transgressions: The Debate Over Retroactive Application of the 1991 Civil Rights Act*, 18 Employee Relations Law Journal 5 (1992)	13

TABLE OF AUTHORITIES—Continued

	Page
DeMars, *Retrospectivity and Retroactivity of Civil Legislation Reconsidered*, 10 Ohio Northern L. Rev. 253 (1983)	7, 9
Fairness in the Workplace: Restoring the Right to Strike: Hearing on S. 55 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, 103rd Cong., 1st Sess. (March 30, 1993)	3
H.R. 5, 103d Cong., 1st Sess., § 1, 139 Cong. Rec. H82 (daily ed. Jan. 5, 1993)	*passim*
H.R. 4000, The Civil Rights Act of 1990: *Joint Hearing: Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990)	10
Kahn, *Completed Acts, Pending Cases, and Conflicting Presumptions: The Retroactive Application of Legislation After Bradley*, 13 George Mason Univ. L. Rev. 231 (Winter 1990)	5
Marcus, *A Percolating Legal Dispute on Civil Rights*, The Washington Post, April 17, 1992, at A21	4
S. 55, 103d Cong., 1st Sess., § 1, 139 Cong. Rec. S191 (daily ed. Jan. 21, 1993)	*passim*
Senate Comm. on Education and Labor, *Comparison of S. 2926 and S. 1958*, 74th Cong., 1st Sess., 21-22 (1935), *reprinted in A Legislative History of the National Labor Reltaions Act*, 1935, pp. 1319, 1346 (1985 Reprint, U.S. Government Printing Office)	15
Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775 (1936)	*passim*

IN THE

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OCTOBER TERM, 1992

No. 92-757

BARBARA LANDGRAF,
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USI FILM PRODUCTS, BONAR PACKAGING, INC.
and QUANTUM CHEMICAL CORPORATION,
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No. 92-938

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v.

ROADWAY EXPRESS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR MIDWEST MOTOR EXPRESS, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

Midwest Motor Express, Inc. ("Midwest") is an interstate motor carrier of freight located in Bismarck, ND, operating in nine states. Midwest's interest stems from likely legislation pending in Congress that would create another retroactive application problem identical to the one under the Civil Rights Act of 1991 now before this Court. Enactment of such legislation without a clear-cut *prospective* effective date would expose Midwest to serious threat of injury. Therefore, *amicus* seeks resolution by this Court of the apparently conflicting precedents on retroactive application of federal civil legislation.

Since August 12, 1991, Midwest has been engaged in a labor dispute with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters"), within the meaning of the Norris-LaGuardia Act (29 U.S.C. § 111(c)), and the National Labor Relations Act ("NLRA") (29 U.S.C. § 152(9)), as applied to the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") (29 U.S.C. § 1398).[1] Nevertheless, not unlike the instant appeals under the Civil Rights Act of 1991, a proposed amendment to the NLRA threatens to turn Midwest's past legal actions into illegal ones—by retroactive application of a new law.

Legislation has been introduced in Congress to amend the NLRA (H.R. 5 and S. 55) which contains no effective date concerning when an employer may be prohibited from hiring permanent replacement workers during economic (wage and benefit) strikes. The relevant identical language of H.R. 5 and S. 55 is excerpted and attached as Appendix A. Consequently, if that legislation passes as currently drafted,[2] and if this Court now fails to resolve the apparent conflict between *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974) and *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), Midwest expects that controversy and confusion similar to that engendered by the retroactive application of the Civil Rights Act of 1991 will occur. Such confusion is likely to result in serious adverse harm to Midwest's business and could subject it to unfair labor practice charges and/or costly state litigation. *See infra* at 13-17. The mere prospect of these occurrences is jeopardizing Midwest's ability to remain in business.

Accordingly, *amicus* has a vital interest in the resolution of the issues raised in this case. *Amicus* believes it will bring insights and information beyond what is presented by Petitioners and Respondents, which will be useful to the Court in deciding the issues presented.[3]

STATEMENT

These cases involve contradictory principles governing the prospective application of civil laws, which conflict this Court so far has been reluctant to resolve. Although the principle of prospectivity dates to the Greeks and Romans,[4] it has not always been followed by this Court.

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[1] The Teamsters struck Midwest on August 12, 1991, after negotiations over a new contract reached an impasse. Following commencement of the strike, the parties resumed bargaining with the assistance of a federal mediator, which bargaining has continued to the date of this brief without settlement. During the course of this labor dispute, Midwest has continued to operate only by hiring permanent replacements as it is permitted to do under current federal law.

[2] H.R. 5 and S. 55 were introduced in the Senate and the House of Representatives in January 1993. H.R. 5, 103rd Cong., 1st Sess., § 1, 139 Cong. Rec. H82, (daily ed. Jan. 5, 1993); S. 55, 103rd Cong., 1st Sess., § 1, 139 Cong. Rec. S191, (daily ed. Jan. 21, 1993). House and Senate floor action is eminent, and the Clinton Administration has endorsed the legislation as drafted. *Fairness in the Workplace: Restoring the Right to Strike: Hearing on S. 55 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 103rd Cong., 1st Sess. (March 30, 1993) (statement of Robert B. Reich, Secretary of Labor).

[3] This brief is filed with the written consent of the parties. The letters of consent have been filed with the Clerk of Court.

[4] As begins the seminal work on the rule against retroactivity: "The bias against retroactive laws is an ancient one." Smead,

At the heart of the dispute is this Court's holding that a court is to apply the law in effect at the time it makes its decision, unless doing so would result in "manifest injustice" or there is statutory direction (or legislative history) to the contrary. *Bradley*, 416 U.S. at 711. On the other hand, this Court more recently reaffirmed that "[R]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have effect unless their language requires this result." *Bowen*, 488 U.S. at 208.

There is a compelling reason for this Court to clarify its position and to adopt a bright-line, common-sense ruling based on *Bowen*. As Justice Scalia urged in *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 110 S. Ct. 1570, 1579 (1990) (Scalia, J., concurring), this Court should overrule *Bradley* and reaffirm the clear intent rule, since retroactive application is "never sought (or defended against) except as a means of 'affecting substantial rights and liabilities,'" and even procedural changes applied retroactively alter such rights. *Id.* at 1585. Thus, this Court should heed Justice Scalia's warning that "manifest injustice" is "just a surrogate for policy preferences" and that justice can mean "whatever other policy motivation might make one favor a particular result." *Id.* at 1587.

Failure to resolve this conflict will lead to continued examples of congressional recklessness, as demonstrated by the instant cases under the Civil Rights Act of 1991.[5] Midwest contends that the same result will occur in

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The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775, 776-85 (1936).

[5] Only controversy, confusion, and expensive and protracted litigation has resulted when Congress deliberately leaves the effective date issue unresolved, as it did in the Civil Rights Act of 1991. As of mid-1992, 49 federal courts had ruled against retroactivity and 35 had ruled in favor of it. *See* Marcus, *A Percolating Legal Dispute on Civil Rights*, The Washington Post, April 17, 1992, at A21.

federal striker replacement and other legislation, unless the cardinal rule upheld in *Bowen* is reaffirmed.

SUMMARY OF ARGUMENT

Respondents ask this Court to affirm the decisions by the Fifth and Sixth Circuits that the Civil Rights Act of 1991 does not apply retroactively. In support, Midwest submits that the judicial chaos surrounding the retroactive application of legislation is the result of a dramatic departure from the historical rule against retroactivity.

Whether *Bradley* and *Bowen* can co-exist on a highly theoretical basis is, at best, debatable. *See infra* note 10 and accompanying text. In practice, however, clarifying the existing confusion necessarily depends on rejecting the irreconcilable precept which *Bradley* has been held to support that it is *not* unjust, in most cases, to apply new civil legislation retroactively.

The Supreme Court must find *Bradley* is applied wrongly as a "presumption" in favor of retroactivity whenever a new liability altering the position of private litigants and parties is involved, whether substantive or procedural rights are implicated. *See* Kahn, *Completed Acts, Pending Cases, and Conflicting Presumptions: The Retroactive Application of Legislation After Bradley*, 13 George Mason Univ. L. Rev. 231, 239-40 (Winter 1990). To this extent, the Supreme Court should overrule *Bradley* and reaffirm the long-standing rule of statutory construction that federal civil legislation only applies prospectively, unless there is a clear legislative intent to the contrary. Ambiguity—either intentional or unintentional—must be resolved in favor of the prospective application of legislation.

Moreover, Petitioners' interpretation of *Bradley* represents a blatant departure from the fundamental principles of fairness inherent in the clear intent rule upheld in *Bowen*. Accordingly, Petitioners' analysis stands wholly outside of the implicit constitutional and relevant policy factors which this Court must weigh in deciding these

cases. Under Petitioners' view, judicial review, Congress' role, and fairness each is undermined.

First, Petitioners erroneously assume that Respondents have acted wrongly in order to argue that Respondents have no "vested right to do wrong." *Rivers v. Roadway,* Pet. Brf. at 29; *Landgraf v. USI Film Products,* Pet. Brf. at 31. Second, Petitioners unpersuasively argue that the plain meaning of the Civil Rights Act of 1991 demonstrates a clear congressional intent to apply the law retroactively. Third, Petitioners move beyond the pale and assert that, under *Bradley,* any law (whether procedural or substantive) must be presumed retroactive based upon whatever label, political spin or policy preference the prevailing members of Congress place on the law, regardless of its effect on private parties or "what the original statute actually meant." *Rivers v. Roadway,* Pet. Brf. at 38. In Petitioners' view, if Congress labels a statute remedial or restorative, there is no room for judicial scrutiny.[6] *Landgraf v. USI Film Products,* Pet. Brf. at 29-33; *Rivers v. Roadway,* Pet. Brf. at 35-39. This Court must reject each of these specious arguments.

Rather than merely a judicial premption useful in interpreting ambiguous legislation, *Bowen* moreover, represents the cardinal rule of statutory construction in determining the retroactive application of legislation. By clarifying *Bowen* as such, this Court will preserve the appropriate burdens and roles of the legislature and the judiciary, including the historical and proper role of judicial review as a check on the power of the legislature unfairly to render laws retroactive.

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[6] Ironically, the one type of law historically not forbidden by the American principle of prospectivity was the "curative" law *validating* past acts that otherwise would have been void. But even curative laws that impaired vested rights or otherwise worked an injustice to parties were condemned by the American principle. *See* Smead at 786, n.36.

ARGUMENT

I. THE PRINCIPLE UPHELD IN BOWEN REPRESENTS THE CARDINAL RULE OF STATUTORY CONSTRUCTION GOVERNING THE RETROACTIVE APPLICATION OF FEDERAL CIVIL LEGISLATION

As Justice Scalia's concurring opinion in *Bonjorno* reveals, the principle that laws and customs should apply only to future transactions unless expressly stated that they apply either to past conduct or to pending transactions dates to the Greeks and Roman law. *Bonjorno*, 110 S. Ct. at *1586; Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1374 (8th Cir. 1992). The principle, originally one of "natural law" which became a legal maxim under English law, was applied as a rule of statutory construction, and so found its way into American law.[7] In the United States, however, largely as a result of judicial review, this rule of statutory construction was combined with the concept of "vested rights" and "justice" to become a part of the concept of justice and a limitation on legislative power.[8] *See* Smead at 776-85.

Thus, the American principle of prospectivity has operated to protect vested rights by invalidating or narrowing the application of statutes that might have applied retrospectively. These included statutes that expressly

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[7] As in England, retroactive American laws were held to be oppressive and unjust, and it was maintained that the essence of law was that it be a rule for the future. Smead at 780, n. 21.

[8] In addition to being a rule of statutory construction in American law, the American courts added a judicial limitation on the constitutional ability of a legislative body to alter pre-enactment rights and conduct. Judicial scrutiny is an important component of the American constitutional system which controls legislative behavior. *See, e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-20 (1976). *See also* DeMars, *Retrospectivity and Retroactivity of Civil Legislation Reconsidered,* 10 Ohio Northern L. Rev. 253 (1983).

were enacted to take effect from a time prior to their passage, as well as statutes that were to operate from the time of their passage, but affected vested rights and past transactions.[9] *See* Smead at 781-787, n.35. The fundamental notion has been and should be that, in most cases, it is unjust to apply new civil legislation retrospectively.

The rule against retroactivity thus embodies American constitutional notions of fairness and due process. Today, these factors must be considered by Congress and the courts in determining the validity of civil legislation which Congress *explicitly* makes retroactive. *See, e.g., Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984) (rejecting a Fifth Amendment due process challenge to a federal statute that retroactively imposed liability on employers who withdrew from multiemployer pension plans); *Turner Elkhorn*, 428 U.S. 1.[10] There-

[9] The prohibition included retrospective laws as defined by Mr. Justice Story in *Society for the Propagation of the Gospel in Foreign Parts v. Wheeler*, (1814) 2 Gall. C.C. 105:

> . . . . Upon principle, every statute, which takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective. . . .

[10] The Supreme Court has found the rational basis standard to be equivalent to the standard applied in *Welch v. Henry*, 305 U.S. 134, 147 (1938), where the Court held that a retroactive tax was constitutional unless its application was so "harsh and oppressive" as to violate due process. *R.A. Gray*, 467 U.S. at 733. This standard requires that there be a rational connection between the legislation's purpose and its retroactive effect. It is consistent with the rule against the retroactive application of legislation where Congressional intent is not explicit or clear. In the latter case, a statute need not be invalidated, but simply applied prospectively.

Arguably, the *Bradley* presumption in favor of retroactivity absent "manifest injustice" arose from cases in which retroactivity was explicit or clearly intended but "injustice" resulted. *See Bonjorno*, 110 S. Ct. at 1584. Theoretically, in this very limited context, *Bradley* remains viable. *See also Fray*, 960 F.2d at 1374 (*Bradley* did not "silently sweep away the traditional principle").

fore, when Congress makes a statute expressly retroactive, presumably it has reviewed these considerations and has resolved the inherent tensions involving fundamental fairness.

Accordingly, it is incongruous to suggest that legislation *not* explicitly made retroactive should be presumed to be retroactive, and then reviewed perfunctorily based upon a standard (such as Petitioners' conclusory remedial scheme), that ignores the fundamental issue of fairness which is the cornerstone of the historical rule of statutory construction against retroactivity. *See* DeMars at 264-272 (because the vested rights—remedial scheme approach utilizes analytically conclusive terms, it does not lead a court to consider the question of fairness which is also basic to the issue of statutory retrospectivity).

In particular, as with the Civil Rights Act of 1991, where Congress considered and rejected explicit retroactive application *and* failed to reach a consensus on its intent, after reviewing the requisite constitutional considerations, no finding of retroactivity is justified or should be compelled. *See infra* at 10-12.

Therefore, Midwest submits that the rule reiterated in *Bowen* is not only that prospectively must be upheld in the absence of clear intent, but further, that prospectivity must govern in determining clear intent when retroactivity is not explicit. Thus, to the extent that *Bradley* establishes a presumption in favor of retroactivity in the absence of clear intent or in determining clear intent, *Bradley* is wrong and should be overruled.

Accordingly, Midwest urges this Court to find that the cardinal rule of statutory construction in determining the retroactive application of federal civil legislation is the principle (and not merely the "presumption") that legislation must be applied prospectively, unless Congress specifically provides to the contrary. *See* Smead at 781 n.22; *U.S. v. Magnolia Petroleum Co.*, 276 U.S. 160, 162 (1928) ("statutes are not to be given retroactive

effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose to do so plainly appears"). *But see Luddington v. Indiana Bell Telephone*, 966 F.2d 225, 228 (7th Cir. 1992), *petition for cert. pending*, No. 92-977 (*dictum*) (prospectivity "is resolved, but not all the way" because we are "speaking only of a presumption" against retroactivity). Only in concert with this paramount rule, can ancillary rules of construction utilized by the courts to determine statutory meaning and legislative intent (i.e., plain meaning) effectively operate without injury to the historical notions of fairness and justice upon which the principle is based.

II. BOWEN PRECLUDES THE RETROACTIVE APPLICATION OF NEW FEDERAL CIVIL LEGISLATION, SUCH AS THE CIVIL RIGHTS ACT OF 1991, WHERE NO CONGRESSIONAL INTENT IS CLEAR

The express retroactive provisions of the Civil Rights Act of 1990 stirred much debate and disagreement as Congress grappled with concerns of fairness and constitutionality.[11] President Bush vetoed the 1990 act,[12] and Congress failed to override the veto. 136 Cong. Rec. S16,589 (daily ed. Oct. 22, 1990). In 1991, the bill's sponsors dropped the express retroactive provisions in order to gain acceptance and, instead, inserted language providing that "the amendments made by this Act shall

[11] *See, e.g.*, H.R. 4000, The Civil Rights Act of 1990; *Joint Hearing: Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990); Civil Rights Act of 1990: *Hearing Before the Senate Comm. on Labor and Human Resources on S. 2104*, 101st Cong., 1st Sess. (1989).

[12] President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 Weekly Comp. Pres. Doc. 1632-34 (Oct. 22, 1990), *reprinted in* 136 Cong. Rec. S16,457, S16,458 (daily ed. Oct. 24, 1990).

take effect upon enactment."[13] § 402 (a), 105 Stat. 1099. Arguably, this language explicitly states that the Act applies prospectively. Alternatively, the inference of Congress' action is that prospectivity is intended. *See e.g., National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 640 (1967).

Because of its contradictory legislative history, however, the 1991 provision leaves open whether the law applies retroactively to cases pending on the date of enactment or whether the law applies only prospectively to future cases.[14] Clearly, the Act was passed without agreement on the issue, and apparently various members of Congress hoped this Court would resolve the known conflicting legal authorities in *Bradley* and *Bowen* in their favor. Congress thereby intentionally left its meaning unresolved. Thus, Petitioners' argument that the plain meaning of the Civil Rights Act of 1991 compels retroactivity fails. *See Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1372-1373 (5th Cir. 1992).

In *Bonjorno*, the Supreme Court simply reaffirmed that "where the congressional intent is clear, it governs." *Bonjorno*, 110 S. Ct. at 1577. But enactment of an ambiguous statute such as the Civil Rights Act of 1991,

[13] On November 21, 1991, President Bush signed the Civil Rights Act of 1991. Pub. L. No. 102-166, 105 Stat. 1071 (1991). In addition to reversing several Supreme Court decisions, the Act made substantial substantive and procedural changes including changes in adjudicator (jury) and damages (compensatory and punitive damages).

[14] *See* 137 Cong. Rec. S15,483, S15,485 (daily ed. Oct. 30, 1991) (interpretive memorandum submitted by Sen. Danforth, the bill's Republican sponsor, arguing against retroactivity); 137 Cong. Rec. S15,472, S15,478 (daily ed. Oct. 30, 1991) (interpretive memorandum submitted by Sen. Dole arguing against retroactivity); 137 Cong. Rec. S15,485 (daily ed. October 30, 1991) (interpretive memorandum by Sen. Kennedy, the bill's Democratic sponsor, arguing for retroactivity by characterizing the law as a "restoration of a prior rule"). *Notably, no sponsor characterized the legislation as merely procedural or remedial.*

or a *silent* statute such as the proposed federal striker replacement legislation, can defy any meaningful attempt to discern congressional intent. Under these circumstances, the historical constitutional underpinnings of American law require that *Bowen* prevail as the cardinal rule of statutory construction, not merely as "presumption" to be utilized in deciding among competing policy considerations. In effect, reaffirming the *Bowen* clear intent rule would ensure that, in the future, Congress will deliberate and provide clear intent on the retroactive application of any legislation that contains potential constitutional and fairness concerns.[15] Therefore, because nothing in the Civil Rights Act of 1991, or its legislative history, expresses a clear congressional mandate requiring retroactive application, the statute must not apply to pending cases.[16]

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[15] While the clear intent rule does not require that Congress make explicit its intent to apply a statute retroactively, it does require that Congress make its intent clear. *Bonjorno*, 110 S. Ct. at 1577. Hence, the cardinal rule against retroactivity may be superseded only by express statutory language or by implication when the statute "requires" it, i.e., when limiting the statute to prospective application would render it completely ineffective by defeating its entire purpose. *See e.g., United States v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 810 F.2d 726, 733 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (in order to be effective, CERCLA had to reach past conduct).

[16] Not surprisingly, the large majority of circuit courts have applied the *Bowen* "presumption" against retroactivity finding no clear expression of legislative intent to the contrary. *See Lehman v. Burnley*, 866 F.2d 33, 37 (2nd Cir. 1989); *Davis v. Omitowoju*, 833 F.2d 1155, 1170-1171 (3rd Cir. 1989); *Leland v. Federal Ins. Adm'n.*, 934 F.2d 524, 528-529 (4th Cir.), *cert. denied*, 112 S. Ct. 417 (1991); *Storey v. Shearson-American Exp.*, 928 F.2d 159, 161-162 (5th Cir. 1991); *Vogel v. City of Cincinnati*, 959 F.2d 594, 597-598 (6th Cir. 1992); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 936 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992); *Simmons v. A.L. Lockhart*, 931 F.2d 1226, 1230 (8th Cir. 1991); *DeVargas v. Mason and Hanger-Silas Mason Co. Inc.*, 911 F.2d 1377, 1392 (10th Cir. 1989), *cert. denied*, 111 S. Ct. 799 (1991); *Gersman v. Group Health Ass'n*, 975 F.2d 886, 900 (D.C. Cir. 1992); *Wagner Seed Co. v. Bush*, 946 F.2d 918, 924 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1584 (1992); *Alpo Pet Foods, Inc. v. Ralston Purina Co.*, 913 F.2d 918, 922-923 (Fed. Cir. 1990).

III. THE RETROACTIVE APPLICATION OF LEGISLATION, SUCH AS THE CIVIL RIGHTS ACT OF 1991, WHICH CREATES NEW LIABILITIES AND DUTIES BEYOND RESTORATIVE LAW, RESULTS IN STAGGERING REAL WORLD CONSEQUENCES

The Civil Rights Act of 1991 significantly expands both 42 U.S.C. Section 1981 and Title VII of the Civil Rights Act of 1964 to include new causes of action as well as new classes of plaintiffs. The enhanced remedies for intentional discrimination under Title VII in effect create new liabilities for sexual harassment in situations that do not involve tangible job detriments, such as "hostile environment" cases in which the plaintiff suffered no specific adverse employment action that resulted in economic harm. Monetary damages were never available before in such cases under Section 1981 or Title VII. Rights under Section 1981 are extended to post-formation contractual relationships. In effect, conduct insufficient to impose *liability* on employers before the Act was passed, may now be enough to result in a finding of discrimination against those same employers. Coil and Weinstein, *Past Sins or Future Transgressions: The Debate Over Retroactive Application of the 1991 Civil Rights Act*, 18 Employee Relations Law Journal 5, 6 (1992); *see e.g., Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370, 1374-1375 (1922); *Luddington*, 966 F.2d at 229.

Nevertheless, Petitioners argue that the Civil Rights Act of 1991 affects only procedure or remedies, and thus should be applied retroactively.[17] In addition to precluding a meaningful analysis of fairness, a key problem with this approach is that the label applied to a particular

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[17] If Congress had, in fact, intended *only* to restore prior law or to provide remedial rights that did *not* create new liabilities, Midwest submits it could have written language to achieve that limited result. *See Johnson*, 965 F.2d 1363.

change may not reflect whether the change alters substantive rights or conduct. The label becomes a "policy" tool for proponents of retroactive legislation. *See Bonjorno*, 110 S. Ct. at 1585.

Petitioners also argue that, because one purpose of the Civil Rights Act of 1991 was Congress' intent to overturn recent Supreme Court decisions on discreet employment law issues, retroactivity must be presumed. *See Rivers v. Roadway*, Pet. Brf. at 35-39. While a few courts, grappling with the conflict between *Bradley* and *Bowen*, have held that retroactive application of a new law is appropriate where Congress clearly intended to overrule recent case law and restore the law to its former state, other courts reject this approach as too speculative. *See Mojica v. Gannett Co.*, 779 F. Supp. 94, 97 (N.D. Ill. 1991) (retroactive application of the Civil Rights Act of 1991 upheld in part on the basis that the Act was meant to "restore" prior law); *but see DeVargas*, 911 F.2d at 1387. By reaffrming *Bowen* as the cardiral rule of statutory construction against retroactivity, this Court would eliminate the expansive dangers inherent in Petitioners' approach. Only prospective application of a new law would be appropriate, absent a clear congressional intent to apply a statute retroactively in order to restore recent prior law.

The potential unfair application of likely federal striker replactment legislation to Midwest's ongoing labor dispute starkly demonstrates the absurdity of Petitioners' position. Under Petitioners' interpretation of *Bradley*, the mere conclusory characterization (albeit erroneous) of federal striker replacement legislation as "restorative" would result in the retroactive application of legislation to Midwest.[18]

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[18] Proponents of H.R. 5 and S. 55 are characterizing the legislation as "restorative law" designed to overturn the Supreme Court's decisions in *NLRB v. Mackay Radio and Telegraph Co.*,

This result could require the National Labor Relations Board ("NLRB") to find that Midwest retroactively committed an unfair labor practice by hiring some permanent replacements after August 12, 1991 under the newly amended law.[19] See Attachment A for proposed language of H.R. 5 and S. 55 adding 29 U.S.C. § 158(a)(6). Moreover, such a result could turn the current labor dispute on its head by converting the Teamsters strike against Midwest from an economic strike into an unfair

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304 U.S. 333 (1938), and *Trans World Airlines v. Independent Federation of Flight Attendants*, 109 S. Ct. 1225 (1989). *See* note 2 *supra*, at 3. The legislative history of the NLRA conclusively refutes this position and demonstrates that the changes sought by H.R. 5 and S. 55 would alter the long-standing legal right of an employer to permanently replace economic strikers affirmed under the NLRA. The legislative history of the Wagner Act of 1935 (the original NLRA) preserved the right of an employer to hire replacements, whether permanent or temporary. Although the Wagner Act did not address the issue directly, a U.S. Senate Education and Labor Committee memorandum regarding the Wagner bill states:

> [The bill] provides that the labor dispute shall be "current," and the employer is free to hasten its end by hiring a new permanent crew of workers and running the plant on a normal basis . . . . The broader definition of "employee" in [the bill] does not lead to the conclusion that no strike may be lost or that an employer may not hire new workers, temporary or permanent, at will.

See Senate Comm. on Education and Labor, *Comparison of S. 2926 and S. 1958*, 74th Cong., 1st Sess. 21-22 (1935), *reprinted in A Legislative History of the National Labor Relations Act*, 1935, pp. 1319, 1346 (1985 Reprint, U.S. Government Printing Office).

[19] Ironically, while the Board may not issue a complaint based upon conduct occurring more than six months before filing and service of the charge (29 U.S.C. § 160(b)), the six month limitations period does not begin to run until the party adversely affected receives actual or constructive notice of the unfair labor practice. *See Lehigh Metal Fabricators*, 267 NLRB 568, 114 LRRM 1064 (1983); *Plymouth Locomative Works*, 261 NLRB 595, 110 LRRM 1155 (1982); *Crown Cork & Seal Co.*, 255 NLRB 14, 107 LRRM 1195 (1981).

labor practice strike. *See NLRB v. Burkart Foam,* 848 F.2d 825 (7th Cir. 1988); *NLRB v. Jarm Enters,* 785 F.2d 195 (7th Cir. 1986); *NLRB v. Charles D. Bonanno Linen Serv.,* 782 F.2d 7 (1st Cir. 1986); *Vulcan-Hart Corp. v. NLRB,* 718 F.2d 269 (8th Cir. 1983). The most significant aspect of an unfair labor practice strike is that strikers are entitled to reinstatement to their former positions upon an unconditional offer to return to work. *Pecheur Lozenge Co.,* 98 NLRB 496, 29 LRRM 1367 (1952), *enforced as modified,* 209 F.2d 393, 33 LRRM 2324 (2nd Cir. 1953). In effect, the economic strikers would be entitled to reinstatement if the NLRB were to find that Midwest commited an unfair labor practice which had the effect of prolonging the economic strike (i.e., that hiring permanent replacements presumptively prolonged Midwest's strike). *See Vulcan-Hart Corp.,* 718 F.2d 269; *Gilberton Coal Co.,* 291 NLRB 344, 131 LRRM 1329 (1988), *enforced,* 888 F.2d 1381 (3rd Cir. 1989). These strikers would have to be reinstated even though Midwest hired permanent replacements. *See Mackay,* 304 U.S. 333.

Moreover, Midwest would be required to terminate its current permanent replacements, even though they were *legally* hired. *See NLRB v. Elco Manufacturing Co.,* 227 F.2d 675 (1st Cir. 1955), *cert. denied,* 350 U.S. 1007 (1956); *NLRB v. Remington Rand, Inc.,* 130 F.2d 919 (2nd Cir. 1942). Midwest's picture could become even more oppressive because the terminated permanent replacement workers could sue Midwest for breach of contract and misrepresentation in North Dakota state court upon their discharge to make room for reinstatement of the economic strikers. *See Belknap, Inc. v. Hale,* 463 U.S. 491 (1983).[20] The weight of such multiple

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[20] The Supreme Court of North Dakota has upheld similar breach of contract suits. *See Lambott v. United Tribes Educational Technical Center,* 361 N.W.2d 590 (1985).

litigation alone could force Midwest out of business. Indeed, the real world consequences to Midwest of applying federal striker replacement legislation retroactively under *Bradley* based upon mere labels could be staggering.

Therefore, it is in determining a clear congressional intent that judicial review and the principle of fairness embodied in the rule of statutory construction against retroactivity become imperative. Petitioners segregate this critical analysis entirely from the determination of the "plain meaning" and "clear intent" of the statute by misinterpreting *Bradley* to require the retroactive application of any new federal civil legislation which is labeled "procedural" or "restorative". As Midwest has shown, this argument is untenable.

CONCLUSION

Because of the conflicting principle in *Bradley* that retroactivity is *not* unjust and is presumed, the door is open for Congress to pass federal civil legislation (such as the Civil Rights Act of 1991 and the proposed federal striker replacement legislation), without resolving its applicability to current disputes. While such a state of confusion may enable Congress to pass controversial legislation, it improperly allows Congress to shift the burden of deciding the issue of retroactivity onto private litigants and the courts at an exorbitant cost.

Therefore, this Court should guide the lower courts and restore judicial order and economy, should encourage Congress to provide clear intent, and should preserve the important, long-standing origins and purpose of the cardinal rule of statutory construction against retroactivity. The Court would accomplish all of these objectives by reaffirming *Bowen* and overruling *Bradley*. Absent explicit retroactive language or clear congressional intent, legislation must apply only prospectively. This is the bright-line, common-sense rule needed to restore fundamental fairness to the concept of retroactivity.

Based upon the foregoing, Midwest submits that the decisions of the Court of Appeals for the Fifth Circuit in *Landgraf v. USI Film Products,* and of the Court of Appeals for the Sixth Circuit in *Rivers and Davison v. Roadway,* are correct in finding that the Civil Rights Act of 1991 applies prospectively, and should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

EXCERPT OF SECTION 1 FROM H.R. 5 AND S. 55

* * * *

JANUARY 5, 1993

* * * *

A BILL

To amend the National Labor Relations Act and the Railway Labor Act to prevent discrimination based on participation in labor disputes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. PREVENTION OF DISCRIMINATION DURING AND AT THE CONCLUSION OF LABOR DSPUTES.

Section 8(a) of the National Labor Relations Act (29 U.S.C. 158(a)) is amended—

(1) by striking the period at the end of paragraph (5) and inserting "; or", and

(2) by adding at the end thereof the following new paragraph:

"(6) to promise, to threaten, or to take other action—

"(i) to hire a permanent replacement for an employee who—

"(A) at the commencement of a labor dispute was an employee of the employer

in a bargaining unit in which a labor organization—

"(I) was the certified or recognized exclusive representative, or

"(II) at least 30 days prior to the commencement of the dispute had filed a petition pursuant to section 9(c)(1) on the basis of written authorizations by a majority of the unit employees, and the Board has not completed the representation proceeding; and

"(B) in connection with that dispute has engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection through that labor organization; or

"(ii) to withhold or deny any other employment right or privilege to an employee, who meets the criteria of subparagraphs (A) and (B) of clause (i) and who is working for or has unconditionally offered to return to work for the employer, out of a preference for any other individual that is based on the fact that the individual is performing, has performed, or has indicated a willingness to perform bargaining unit work for the employer during the labor dispute."

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